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WOLF CREEK NUCLEAR OPERATING)	
CORPORATION,)	
)	
Employer,)	
)	
and)	Case No. 14-RC-168543
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 225,)	
)	
Petitioner.)	
)	
)	

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I. EMPLOYER'S BRIEF ON REVIEW

Pursuant to § 102.67 of the Board's Rules and Regulations, the Employer, Wolf Creek Nuclear Operating Corporation ("Wolf Creek" or "Employer"), respectfully requests the Board's review of the Regional Director's Supplemental Decision ("5/9/17 Decision") dated May 9, 2017, finding that the Employer's Buyers I, II, III, and Lead Buyer are no longer "managerial employees" under the National Labor Relations Act. ("Act"). (5/9/17 Decision, at 10).

This Decision represents a grave and disturbing departure from the Region's previous, final and binding decision in Case 17-UC-210 (hereinafter "2000 Decision"), wherein the Region found these *same* job classifications to be "managerial employees," and therefore, excluded from coverage of the Act. The Regional Director categorically rejected the Region's 2000 Decision, finding that "evidence demonstrates that material changes warrant declining to give the decision in Case 17-UC-210 preclusive effect." (5/9/17 Decision, at 2). In so doing, the Decision does violence to well-settled Board law and legal principles, ignores clear statutory language, applies choice facts disparately, and otherwise engages in outcome-based decision-making of the worst kind. It also is highly prejudicial to the Employer as the Decision ignores dispositive testimony and evidence concerning the Employer's technological advances to EMPAC¹ – an issue that strikes at the heart of this case. In addition to departing from the Region's 2000 Decision, the Decision turns well-settled Board precedent in *Concepts & Designs, Inc.* 318 NLRB 948 (1995) and *Lockheed-California Co.*, on its head. 217 NLRB 573 (1975). The Decision profoundly fails to "do justice" to the issues and the parties' interests. As such, this Decision calls out for review. Compelling reasons exist for granting this request, as follows:

¹ Implemented in 1998, and still in use today, EMPAC is Wolf Creek's automated computerized system used to assist the Buyers as they procure goods and services on behalf of Wolf Creek.

1. The Decision raises substantial questions of law and policy because its departure from the Region's previous, final and binding decision in Case 17-UC-210 contravenes the Board's longstanding policy precluding re-litigation, as well as the clear statutory language of Section 102.67(g);
2. The Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer. Specifically, the Regional Director failed to consider the evidence and testimony that the Buyers' job duties did not change in any material respect since at least May 2000, the date of the Region's 2000 decision;
3. The Decision raises substantial questions of law and policy because of its departure from and erroneous reliance on officially reported Board precedent in *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) and *Lockheed-California Co.*, 217 NLRB 573 (1975) *et al.*; and
4. The Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer as the Regional Director failed to consider the record evidence establishing the Buyers perform the same duties performed in 2000, which are aligned with the interests of management.

The Employer, therefore, requests that the Board grant this Request for Review and find, consistent with the Region's 2000 Decision, that the job classifications of Buyer I, II, III, and Lead Buyer are "managerial employees" under the Act.

II. STATEMENT OF THE CASE

Wolf Creek operates a nuclear power facility located in Burlington, Kansas. Out of the approximately 1,100 employees employed at the facility, about 400 are represented by the International Brotherhood of Electrical Workers Local Union 225 (“Union” or the “Petitioner”). At issue is the Union’s petition to represent Buyers I, II, III and the Lead Buyer. This is the *same* issue addressed by the Board in its May 4, 2000 Decision. On January 28, 2016, Petitioner filed Case 14-RC-168543, petitioning to represent “All full-time and part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit.” (02/16/16 Decision & Order at 1 “2/16/16 Decision”). On February 1, 2016, the Employer filed a motion to dismiss the petition as barred pursuant to Section 102.67(g) and under the doctrine of *res judicata*. The Regional Director denied this motion and the matter was heard before Hearing Officer Carla K. Coffman on February 5, 2016, to determine once again “whether or not the job classifications of Buyer I, Buyer II, Buyer III, and Lead Buyer are managerial employees.” (Tr. 11:21-25).²

Significantly, Hearing Officer Coffman noted that because “there has been a previous determination that *these same job classifications were found to be managerial*, in Case 17-UC-210 . . . I am taking judicial notice of the Acting Regional Director’s Decision, Order and Clarification of Bargaining Unit, that issued on May 4th, 2000, in Case 17-UC-210.” (*Id.* at 12:1-19) (emphasis added). Consistent with this finding, Hearing Officer Coffman explained that Petitioner had the burden to establish a material change in the Buyers’ job duties, sufficient to disturb the Acting Regional Director’s previous findings and conclusions. (*Id.* at 19:19-20:9; Tr. 2017 251:2-6).

² Reference to the February 5, 2016 hearing transcript will be identified as “Tr. 2016.” Reference to the April 25, 2017, hearing transcript will be identified as “Tr. 2017” References to the exhibits introduced at both hearings will be referred to as “Joint Ex.,” “Employer Ex.” and “Petitioner Ex.” followed by the appropriate number.

At the February 2016 and April 2017 hearings, Petitioner argued that the job duties and responsibilities of Buyers I, II, III and Lead Buyer, employed in Employer's Supply Chain Division, Purchasing Department, underwent "significant changes" since May 4, 2000, due to advances in technology that streamlined the purchasing procedure for Buyers; in particular, the Employer's utilization of EMPAC. (Tr. 2016 13:12-18:18).

On February 16, 2016, the Regional Director issued his Decision and Direction of Election, finding that the doctrine of *res judicata* did not apply, and that the Buyers were no longer managerial employees.

Subsequently, on March 1, 2016, the Employer filed a Request for Review of the Regional Director's Decision and Direction of Election. The Employer requested the Board's review on two separate grounds: (1) that the Regional Director erred in not applying the doctrine of *res judicata*, based on the prior decision in 17-UC-210; and (2) that the Regional Director clearly erred in determining that the buyers are not managerial employees.

On April 7, 2017, the three member Board issued its Decision on Review and Order granting in part and denying in part the Employer's Request for Review.³ The Board, affirming the Employer's argument, found the Regional Director's analysis misapplied the doctrine of *res judicata* in that he failed to give preclusive effect to the 2000 decision, and he failed to recognize the 2000 decision as final. "[A] decision such as the 2000 decision . . . one that has not been appealed and that resolves the disputed issues in a manner that is binding upon the parties—is final for preclusion purpose." *Wolf Creek Nuclear Operating Corporation*, 365 NLRB No. 55, slip op. at 1 (April 7, 2017). The Board ordered the Regional Director to consider "whether the record demonstrates changed circumstances sufficient to allow reconsideration of the buyers'

³ The Board granted Employer's Request for Review with regard to the Regional Director's misapplication of the doctrine of *res judicata* because it raises a substantial issue warranting review. Employer's remaining requests were denied without prejudice.

managerial status.” (*Id.* at 3). Further the Board found “[i]t is appropriate to place the burden on the party opposing preclusion—here, the Petitioner—to demonstrate that material changes have occurred since the prior decision.” (*Id.*).

Accordingly, on April 18, 2017, the Regional Director issued his Order Reopening Record and Notice of Further Hearing. On April 25, 2017, Hearing Officer Carla K. Coffman reopened the record. At the February 2016 hearing, Petitioner argued that Wolf Creek implemented the EMPAC system after the 2000 Decision. In fact, at the April 2017, hearing, Petitioner completely abandoned its previous argument regarding the timing of EMPAC’s implementation and conceded that Petitioner’s central argument at the 2016 hearing—the implementation of EMPAC after 2000 decision—actually occurred in 1998—two years prior to the 2000 decision. Petitioner stipulated that the Buyers had been using EMPAC since at least November 1998. (Tr. 2017 250:17-21). Importantly, Petitioner conceded that the *only* change was the *efficiency* in how these *same* tasks and responsibilities were being performed. (Tr. 2016 156:19-157:7).

Based on the record developed on February 5, 2016, and on April 25, 2017, the Regional Director issued his May 9, 2017, Supplemental Decision, wherein he determined that “evidence demonstrates that material changes warrant declining to give the decision in Case 17-UD-210 preclusive effect.” (“5/9/17 Decision”). The testimony and evidence adduced at the hearing did not substantiate any material change in the Buyers’ job duties and responsibilities as a result of EMPAC. Wolf Creek now moves for review.

A. PREVIOUS CASE: 17-UC-210

On April 7, 1998, Wolf Creek filed a unit clarification petition seeking to exclude as managerial employees Quality Specialists and Buyers I, II, III and Lead Buyer. (2000 Decision).

On May 4, 2000, the Acting Regional Director issued a Decision, Order and Clarification of Bargaining Unit, in Case 17-UC-210, finding the *same* Buyers to be “managerial employees,” and thereby excluded from coverage of the Act. (*Id.*). The IBEW did not file a request for review in that case and, under Section 102.67(g) of the Board’s Rules and Regulations, the Acting Regional Director’s actions in that case are final and binding. 29 C.F.R. § 102.67(g) (“[T]he regional director’s actions are final unless a request for review is granted.”); *see also Maphis Chapman Corp.*, 151 NLRB 73, 84-85 (1965) (holding Regional Director’s decision final and binding).

III. STATEMENT OF FACTS

A. Overview Of The Supply Chain Division, Purchasing Department.

Wolf Creek’s Supply Chain Division, Purchasing Department, currently employs four Buyers to procure all goods and services for the Employer, excluding fuel. (Tr. 2016 93:12-24; 177:11-14). The Buyers report to Everette Weems, Supervisor of Purchasing and Contracts, who in turn, reports to David Sullivan, Manager of Purchasing and Supply Chain. (*Id.* at 33:14-35:9; 177:16-18; 204:1-11).

B. Requirements For The Positions Of Buyer I, II, III, And Lead Buyer.

Wolf Creek requires Buyers to have the necessary education and experience. (*Id.* at 26:15-25). For example, Buyer I’s must have either an Associates Degree or a High School Diploma, as well as four years of experience in procurement/supply chain or in an office environment. (2016 Decision at 3). Buyer II’s are required to have a Bachelor’s Degree and two years of experience, an Associates Degree and six years of experience, or a High School Diploma and twelve years experience. (*Id.*). Buyer III’s must have a Bachelor’s Degree and four

years of experience, an Associates Degree and eight years of experience, or a High School Diploma and twelve years experience. (*Id.*).

Buyers also train for and receive certifications through the Institute of Supply Management (“ISM”), specifically the Accredited Purchasing Practitioner (“APP”) and the Certified Purchasing Manager (“CPM”) certifications. (*Id.* at 27:9-28:24). To maintain these certifications, Buyers must fulfill ISM’s continuing education requirements. (*Id.* at 30:25-31:23).

C. The Purchasing Procedure – Buyers’ Job Responsibilities.

The Buyers’ primary role is to procure all goods for the Employer, excluding nuclear fuel. (*Id.* at 177:11-14). Buyers may also handle requests for labor services. (*Id.* at 53:15-54:3). In both instances, Buyers possess significant discretion in exercising their job responsibilities. (*Id.* at 54:10-55:5). Although the Buyers’ job duties are governed by procedures and policies, it is undisputed that these policies have *always* existed. (*Id.* at 123:3-13). In fact, Petitioner’s exhibits indicate that “procurement functions and processes remain the same” (Petitioner Ex. 7); that policies were revised with “minor changes for clarity in responsibility section for Purchasing and Contracts” (Petitioner Ex. 9); and policies were reviewed for “2-year divisional relevancy review” and not for the purpose of making changes to the job functions. (Petitioner Ex. 10).⁴

1. Initiation Of The Purchasing Procedure – Requisition Forms.

The purchasing process is initiated when the Purchasing Department receives a requisition. (Tr. 2016. 42:23-43:19; 97:12-18). Generally speaking, the requisition identifies the item to be purchased, including but not limited to, the type, purchase price, and any previous purchases by the Employer. (*Id.* at 57:17-58:10; 98:3-18; 177:25-178:11).

⁴ Petitioner’s exhibits 7, 9, and 10 are subject to the Employer’s “2-year divisional relevancy review” in which Wolf Creek reviews certain policies every two years. (Tr. 2017 341:4-8; 427:19-428:4; 431:12-18).

The requisition is created through the Employer's EMPAC computer system. (*Id.* at 125:14-23). EMPAC is the computer program utilized by Buyers in procuring items for the Employer. (*Id.* at 77:9-18; 125:14-23; Petitioner Ex. 5). Buyers are provided with desktop guideline instructions for processing purchases through EMPAC. (*Id.*; Petitioner Ex. 5). Employees are trained to create requisitions on the EMPAC computer system. (*Id.* at 45:3-14). Tracy Beard ("Beard"), Buyer III, is responsible for training employees. (*Id.*). Requisitions are then forwarded to the Accounting Department for review and approval prior to reaching the Purchasing Department. (*Id.* at 68:23-69:11).

2. Receipt Of The Requisition Forms.

Upon receipt, the Purchasing Department assigns the requisition to the Buyer who specializes in these types of purchases. (*Id.* at 94:13-96:1). The Buyer assigned to the requisition creates a packet of information detailing the Employer's previous purchases. (*Id.* at 69:18-70:21).

The Buyer may be required to complete a Commitment Approval Summary Form ("CASF") when the cost of the requested item exceeds a predetermined monetary amount. (*Id.* at 94:13-96:1; Petitioner Ex. 3). Regardless, a CASF must be completed if an item exceeds \$250,000. (Tr. 2016 61:1-5). The CASF is processed after the Buyer obtains the necessary signature for approval. (*Id.* at 62:19-63:12). However, items that fall below the \$250,000 threshold can be approved via electronic mail. (*Id.* at 65:13-66:1). In these instances, EMPAC may alert a Buyer as to a discrepancy, but it does not preclude the processing of the requisition. (*Id.* at 64:7-65:3).

3. Decision To Competitively Bid The Requisition.

After being assigned the requisition, the Buyer unilaterally determines whether the item should be competitively bid. (*Id.* at 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 325:11-326:4) Although Buyers are required to competitively bid items in excess of \$50,000, Buyers regularly issue competitive bids for items well under this amount. (Tr. 2016 104:13-24; 105:12-23). Ultimately, the decision to issue a competitive bid is at the discretion of the Buyer. (*Id.* at 83:4-12).

To begin the competitive bidding process, the Buyer identifies the suppliers from whom to solicit bids. (*Id.* at 108:9-24; Employer Ex. 1) (“The Buyer determines the suppliers from whom to solicit bids, based on commercial, technical, and/or quality considerations.”). (Tr. 2016 108:9-24). The Buyer has significant discretion in compiling the list of potential bidders. (*Id.* at 150:9-151:19; 166:19-23; 181:4-160182:6-15). For example, although the Buyer will identify the Original Equipment Manufacturer (“OEM”) and other Employer-authorized distributors from the Employer’s database, the Buyer may also find additional suppliers using the internet. (*Id.* at 55:6-22; 181:7-16). Thus, Buyers have the authority to go outside the Employer’s database to locate a supplier or labor services provider. (*Id.* at 55:6-22). Bids may be solicited either in writing or verbally. (*Id.* at 109:15-110:14; Employer Ex. 1). However, bids in excess of \$50,000 must be submitted in writing. (*Id.*).

4. Creation Of A Request For Quotation.

Once the Buyer compiles a list of potential suppliers, the Buyer will generate a Request for Quotation (“RFQ”) to send to these suppliers. (*Id.*). As part of the RFQ, the Buyer must identify various contract clauses that describe the specifics of the purchase. (*Id.* at 71:9-21). It is the Buyers’ responsibility to identify the proper clauses for incorporation. (*Id.* at 72:10-22). To

assist, the Buyers may consult a clause worksheet, which is essentially a “cheat sheet.” (*Id.*). The Buyer also determines the bid due date for inclusion on the RFQ. (*Id.* at 114:4-12). After the Buyer includes the required information and corresponding clauses, an RFQ is generated through the EMPAC computer system. (*Id.* at 72:10-22). Although EMPAC may alert the Buyer as to an inaccuracy in the RFQ, a Buyer may override the program and proceed with the RFQ. (*Id.* at 75:22-25).

On occasion, suppliers will request an exception to the RFQ. (*Id.* at 182:24-183:14). If the product is safety-related, the Buyer will send the exception to the Procurement Engineer for approval. (*Id.*). If the product is not safety-related, the Buyer may seek the approval of the original requisitioner. (*Id.*). Buyers are responsible for evaluating those exceptions to determine the impact on the bid. (*Id.* at 110:24-112:4; Tr. 2016 183:2-21; Petitioner Ex. 9 p. 44 at B.1.1-B.2). It is the Buyer’s job to ensure a level playing field for all bidders. (*Id.* at 112:5-113:9). To assist with this, Buyers are authorized to schedule or conduct pre-bid or pre-award conferences with the bidders. (*Id.* at 113:10-114:3).

5. Buyers’ Authority And Discretion In Selecting A Supplier.

Upon receipt of the suppliers’ bids, the Buyer will conduct a comparative analysis of the bids. (*Id.* at 134:11-16). Although the Buyer typically will select the lowest bid, the Buyer retains the discretion to select another supplier. (*Id.* at 84:12-85:14; 175:15-20; 183:15-184:3; Tr. 2017; 400:16-20). In that instance, the Buyer will “try to give an explanation . . . why we did not choose the lowest bidder.” (*Id.* at 118:25-119:5). For example, the Buyer, at his discretion, may select a higher bid based on a variety of factors, including but not limited to, delivery time, location of the supplier, cost of freight, safety, and the form of delivery. (*Id.* at 118:18-119:5;

151:1-19; 153:4-5; 184:4-11). Importantly, although management has always possessed the ability, it generally does not review the Buyers' selections. (*Id.* at 86:2-14).

The comparative analysis is initially generated through EMPAC. (*Id.* at 184:16-185:7). However, because the Buyer must take into consideration a variety of factors affecting the job requisition, the EMPAC analysis is not determinative. (*Id.*).

Overall, "[w]hen determining to whom the bid will be awarded, Buyers rely on their background, experience, training, certifications, and knowledge." (*Id.* at 130:20-131:24; 154:6-155:1). Buyers essentially "determine what the primary need [of the Employer] is." (*Id.* at 166:8-18). To this end, Buyers routinely negotiate with suppliers for the best price, resulting in substantial savings for the Employer. (*Id.* at 161:13-18). Buyers independently and without approval, determine to whom the bid is awarded. (*Id.* 186:25-187:3; Tr. 2017 328:10-15; 367:10-24). Buyers are ultimately responsible for ensuring all necessary reviews and approvals have been obtained prior to making the award to the supplier. (*Id.* at 125:5-11; Employer Ex. 2).

6. Preparation Of The Purchase Order.

Once a supplier is selected by the Buyer as part of the competitive bidding process, the Buyer prepares a purchasing order. (*Id.* at 102:1-6; 118:15; 158:10-17; 175:15-20; 186:25-187:3; 190:21-25; Tr. 2017 331:2-5; 336:1-3; Petitioner Ex. 8 p. 19 at 6.0). This also applies in the instance an item is not competitively bid. (*Id.* at 98:19-99:9). In both scenarios, Buyers retain a substantial level of discretion and authority to purchase the requested item, limited only by the purchasing authority of the signatory requestor. (*Id.* at 98:19-99:9). Purchase Orders are not reviewed by the Purchasing and Contracts Supervisor prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2). Thus, a Buyer is authorized to place a purchase order and thereby bind the Employer for the amount approved in the requisition. (*Id.* at 100:6-13; 102:1-10).

Currently, managers have the authority to purchase items for an amount up to \$250,000. (*Id.* at 99:16-23).

Additionally, a Buyer is authorized to purchase an item that exceeds the amount originally approved for in the requisition. (*Id.* at 68:3-16). In particular, if the bids come back and are less than \$1,000 per line item than what was on the original requisition, the Buyer has the authority to approve and bind the Employer for this excess amount without management approval. (*Id.*; Petitioner Ex. 2). Once again, in this scenario, the Buyer is able to override EMPAC and make the purchase without prior approval. (*Id.*).

Once the Purchasing Order is placed by the Buyer, the Buyer has committed the Employer's funds for the purchase of the requisitioned item. (*Id.* at 124:22-125:2; 169:6-24). The Buyer is ultimately responsible for the content and accuracy of the purchase order. (*Id.* at 124:17-21; Employer Ex. 2). Without prior approval or necessarily subsequent review, the Buyers initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2).

If there is a dispute, the Buyer is authorized to communicate with the supplier to negotiate a resolution. (*Id.* at 170:4-171:10). Buyers must also exercise their discretion to ensure that proprietary and financial information remains confidential. (*Id.* at 210:20-211:7).

In 2015, the Buyers committed a substantial amount of money on behalf of the Employer, totaling **\$21 million**. (*Id.* at 102:11-17; 204:22-205:1). Through their independent negotiations, the Buyers also saved the Employer "a little over \$300,000, about \$330,000" in that same year. (*Id.* at 205:2-7).

7. Executing Delivery Of The Purchased Item.

Thereafter, the Buyer is responsible to arrange for shipping and to ensure the shipments are reasonably priced. (*Id.* at 120:9-122:9). Similar to the competitive bidding process, Buyers accept and analyze bids from freight carriers. (*Id.* at 187:14-188:24). Buyers select the freight carrier based upon price and the Employer's need. (*Id.*). In doing so, the Buyer has the ability to choose which carrier to use. (*Id.*). The Buyer is also responsible for resolving disputes with carriers on behalf of the Employer. (*Id.* at 189:10-190:18).

IV. ARGUMENT

A. The Regional Director Erred In Finding A Material Change To The Buyers' Job Duties.

In his 5/9/17 Decision, the Regional Director, erroneously determined that Petitioner presented sufficient evidence to establish material change to the Buyers' job duties. The Regional Director made this faulty conclusion based on his assessment of 1) alleged general technological advances; 2) the reduction of competitive bids; and 3) Buyers' alleged reduced involvement in the RFQ process.

1. Wolf Creek's Technological Advances And Innovations Are Insufficient To Justify Material Change To The Buyers' Job Duties.

Technological innovation is insufficient to justify reconsideration of a prior classification where the only significant difference between the work performed before and after the innovation is the result of "improved methodology and increase[d] efficiency brought on by computer technology." *Teamsters United Parcel Serv.*, 346 NLRB 484 (2006); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, (1999) (technological innovation is insufficient to demonstrate a material change where the innovation does not change the work to such an extent that it would no longer make sense to include the disputed employees); *Winchell Co.*, 315 NLRB

526, n.2 (1994), *enfd*, 74 F.3d 1227 (3d Cir. 1995) (employer’s switch to “desktop computers” that “eliminated the work of prepress personnel such as artists and typesetters [so that the] work was [instead] done by customers who forwarded it via computer” did not constitute a “change” in “the scope and direction of business;” rather, the “technological advance of the desktop computers changed the [employer’s] operation by degree not kind.”); *United Technologies Corp.*, 287 NLRB 198, 204 (1987) (technological innovation is insufficient to justify a review in a prior classification because it fails to meet the burden of showing sufficient change/dissimilarity to warrant a review).

In this matter, technological innovation, including the usage and development of EMPAC, is insufficient to demonstrate a material change. The Regional Director completely ignored relevant and applicable case law governing the impact of technological change on the Buyer classification. Instead, the Regional Director incorrectly determined that the “EMPAC system, largely a result of technical innovation, fundamentally limited the buyer’s discretion.” (5/9/17 Decision at 6). The Regional Director reasoned that “EMPAC has evolved since 2000, it has allowed the Employer to integrate its procurement procedures and its procurement software and thus regulate and restrict the buyer’s discretionary actions.” (*Id.*). In support of this reasoning, the Regional Director imprudently relied on the concept that “information that was once available only in the mind of a seasoned buyer or maintained in hardcopy form is now not only easily, but automatically accessible on a buyer’s desktop, as well as to managers and other employees. . . .” (*Id.* at 7). The fact that the Buyers previously had to recall, or pull hard copies of documents and now instead can access that same information in a computer program, cannot establish a material change to the Buyers’ job duties. Indeed, the Buyers are performing the same functions and duties as they did in 2000.

Further, absent any authority to support such claims, the Regional Director relied on witness' allegations as absolute facts. For example, the Regional Director states that EMPAC underwent "major changes in 2002, 2008, and 2010." (*Id.* at 4). Yet, Petitioner presented no testimony to establish any such material changes occurring at those times. Such arbitrary and capricious statements by the Regional Director are unfounded and not supported by the Record.

The Regional Director further contends that the Buyers no longer have discretion in that EMPAC provides the Buyers with "automatic pop-up warnings" (*Id.* at 7); it calculates bids and shipping costs (*Id.*); and it has an audit trail. (*Id.*). The Regional Director's reliance on these alleged material changes are completely misplaced. The pop-up boxes simply alert Buyers of certain check and balances. Since at least 2000, the Buyers have followed the rules for which the pop-ups are used and have had to calculate bids. Additionally, since at least 2000, the Buyers' work has created an audit trail. Prior to EMPAC, such trail was in paper form as opposed to EMPAC's electronic audit trail. In no manner or form have these removed the Buyers' discretion nor do these technological innovations demonstrate material change.

2. The Regional Director Erred In Determining That Changes In Competitive Bidding Caused A Material Change To The Buyers' Job Duties.

The Board has a "no re-litigation rule" that precludes a party from challenging a determination without sufficient evidence of a recent, substantial change. *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999). Recent, substantial changes are determined on a case by case basis, where the party asserting the change bears the burden of proof. A failure to show recent, substantial change is fatal to a petition. *See Mountain States Telephone Co.*, 175 NLRB 553 (1969); *Lufkin Foundry & Machine Co.*, 174 NLRB 556 (1969); *Nat'l Can Corp.*, 170 NLRB 926 (1968); and *Sterilon Corp.*, 147 NLRB 219 (1964).

In this matter, the Regional Director misconstrued the facts and determined that the “Employer no longer relies on Buyers to prepare competitive bids for purchases . . . as frequently as it did in 2000.” (5/9/2017 Decision at 7). The fact is, once the Buyer receives the requisition, the Buyer determines whether it will be competitively bid. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 2017 325:11-326:4; 327:9-13). As was the case in 2000, and is still the case today, Buyers continue to engage in the practice of seeking competitive bids and determining whether a competitive bid is necessary. (*Id.*).

It is uncontested that some items cannot be competitively bid. Specifically, because of the highly specialized nature of safety and engineered items, they cannot, and have not been competitively bid. For these items, the Buyers are limited to a prescribed list of suppliers. (Tr. 2016 181:17-182:12; Tr. 2017 400:5-11; 413:18-414:13; Petitioner Ex. 8 p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4). This practice has not changed since the 2000 decision. Even if the number of competitive bids has declined, the Buyers still perform competitive bids as part of their routine job functions. Accordingly, such change is not material and therefore the Regional Director’s decision is flawed.

3. The Regional Director Erred In Determining That The Buyers’ Involvement In The RFQ Process Constitutes A Material Change To The Buyers’ Job Duties.

Again, the Regional Director made no effort to base his Supplemental Decision on actual facts and instead took issue with the “manner” in which the Buyers perform their job. (5/9/2017 Decision at 8). Specifically, the Regional Director found material change to the Buyers’ job duties in that “[e]ven though [] [they] remain responsible for preparing and issuing purchase orders as they did in 2000, there has been a sufficient material change in the *manner* in which they perform those duties to warrant reconsideration of their managerial status.” (*Id.*) (emphasis added). An employer's new way of manufacturing fails to show “a fundamental change in

employee classifications, responsibilities, and supervision [when] the same people make the same product.” *Leach Corp.*, 312 NLRB 990, 994, 995 (1993), *enfd*, 54 F.3d 802 (D.C. Cir. 1995) Although “significant, [the new] process [was] not really different from any change in manufacturing process resulting from advancing technology.” (*Id.*).

The evidence does not support that Buyers are less involved in RFQ’s. In fact, the testimony is that they are still involved in the RFQ process. (Tr. 2016 168:9-16; 187:22-24; Tr. 2017 327:4-8). Even Petitioner offered Exhibit 9, which states the Buyers “[p]rocess and administer Request for Quotes.” (Tr. 2017 288:15-21; Petitioner Ex. 9 p. 2 at 5.7.2.1).⁵ In *Good N’ Fresh Foods, Inc.*, a successor bakery continued to engage “in the same business” but switched from producing made from scratch to frozen baking and continued to engage in “the production and wholesale distribution of baked goods.” 287 NLRB 1231, 1235 (1988). Like the Buyers, *the Good N’ Fresh* “employees continued to perform substantially the same jobs” and therefore no material change could be established. (*Id.*). *E.g., United Tech. Corp.*, 287 NLRB 198, 204 (1987) (technological innovation is insufficient to justify a review in a prior classification because it fails to meet the burden of showing sufficient change/dissimilarity to warrant a review). The Regional Director’s findings are arbitrary and not based on any factual findings of material change presented in either the 2016 or 2017 hearing. Accordingly, the Regional Director’s Decision has prejudiced the Employer.

4. The Decision Is Factually Flawed In That The Regional Director Failed To Consider That The Buyers Still Perform The Same Duties Today, As Described In The 2000 Decision.

In addition to establishing a material change, the party challenging the previously litigated issue must also show that the evidence relied upon was not available during the first

⁵ Of importance is that Petitioner’s Exhibit 9 is a Wolf Creek “Document Revision Request,” (“DRR”). Simply stated, a DRR is issued when a policy is revised. Wolf Creek issued this DRR to make “Minor changes for clarity in responsibility section for Purchasing and Contracts.” (Petitioner Ex. 9 p. 1).

proceeding, or that special circumstances otherwise exist. *See e.g., Sabine Towing & Transport*, 263 NLRB 114 (1982) (finding no essential change in the living or working conditions of the employees is insufficient to overcome preclusion); *Pittsburgh Plate Glass Co., v. NLRB*, 313 U.S. 146, 162 (1941); *NLRB v. Certified Testing Laboratories, Inc.*, 159 NLRB 881 (1966) *enf'd* 387 F.2d 275 (3rd Cir. 1967); *SOHIO Petroleum Co., A Div. of SOHIO Natural Res. Co.*, 239 NLRB 281 (1978) (mere contention of a material change in the type of work performed at an employer's facility, without evidence of the same, is insufficient to warrant re-litigation of issues).

Indeed, the 2000 Decision enumerates the Buyers' responsibilities, of which, nothing material has changed. In fact, as evidenced by the testimony and exhibits in the 2016 and 2017 hearings, the Buyers' duties remain the same.

1. The Buyers procure goods and services (except fuel) for the ER. (Tr. 2016 92:20-24; 177:11-14; Tr. 2017 415:11-15; Petitioner Ex. 8 p. 19 at 6.2.2).
2. The Buyers report to the Purchasing and Contracts Supervisor. (Tr. 2016 93:7-11; 177:15-118; Tr. 2017 424:9-12; 415:21-23; Petitioner Ex. 8 p. 19 at 5.7.2).
3. Purchases are initiated by a purchase requisition. (Tr. 2016 97:12-18; 157:11-13; 175:15-20; 177:25-178:1; Tr. 2017 331:9-14; 338:24-339:7; 343:8-9; Petitioner Ex. 8 p. 19 at 6.0).
4. The purchase requisition is approved by a manager's signature. (Tr. 2016 102:18-23; 178:12-179:2; Tr. 2017 416:13-15; Petitioner Ex. 8 p. 19 at 6.1.1).
5. The amount authorized for expenditure depends upon the level of management who approves the requisition. (Tr. 2016 158:4-9; 179:9-15; Tr. 2017 416:16-20; 356:17-25; 364:9-15; 270:16-24; Petitioner Ex. 9 at 42).
6. The spending authority of the signatory requisition manager limits the amount that can be expended on any particular requisition. (Tr. 2016 98:19-100-11; 146:10-147:4; 179:9-15; Tr. 2017 270:16-24; 356:17-25; 364:9-15; 416:16-20; Petitioner Ex. 9 at 42).
7. After a requisition has been authorized, it is sent to the purchasing department. (Tr. 2016 102:24-103:1; 179:16-19; Tr. 2017 339:15-25; Petitioner Ex. 9 at 42).

8. The Purchasing and Contracts Supervisor assigns each requisition to a Buyer, depending on the request and the Buyer's expertise and familiarity with the commodities and suppliers. (Tr. 2016 103:6-18; 179:16-180:4; Petitioner Ex. 8 p. 18 at 5.1).
9. Once the Buyer receives the requisition, the buyer determines whether it will be competitively bid. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 2017 325:11-326:4).
10. Where the value of the goods or services exceeds \$5,000, the Buyer is to issue a competitive bid.⁶ (Tr. 2016 132:16-25; 180:9-20; Tr. 2017 325; 437:11-438:15).
11. A competitive bid is not required for limited source items or recently purchased items. (Tr. 2016 181:18; Tr. 2017 437:11-438:15).
12. When a request is to be competitively bid, the buyer compiles a list of potential suppliers from whom he will seek a bid. (Tr. 2016 151:20-152:6; 166:4-18; 175:15-20; 180:24-181:3; Tr. 2017 399:21-25; 375:18-25; Petitioner Ex. 8 p. 17 at 4.0).
13. The competitive bid list may be comprised of past successful bidders, suppliers of other commodities who have informed the Buyer of their desire to competitively bid, suppliers listed in trade journals, or suppliers found on internet sources. (Tr. 2016 150:9-151:19; 166:19-23; 181:4-160).
14. For safety related items, buyers are limited to a prescribed list of suppliers. Buyers can seek to expand this list. (Tr. 2016 181:17-182:12; Tr. 2017 413:18-414:13; 400:5-11 Petitioner Ex. 8 p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4).
15. Buyers determine how many suppliers are placed on the competitive bid list. A minimum of three suppliers are to be included in the bid. (Tr. 2016 182:13-15).
16. Buyers issue a request for quote to potential suppliers. (Tr. 2016 175:15-20; 182:16-21; 190:21-25).
17. The request for quote identifies the requirements of the goods or services and a bid date, which the Buyer selects. (Tr. 2016 182:16-21).
18. Potential vendors may submit exceptions to the bid's requirements. (Tr. 2016 110:15-113:14; 116:13-117:23; 182:24-183:1).
19. The Buyer evaluates whether the exception is acceptable and may seek the assistance of the Employer's departments. (Tr. 2016 183:2-21; Petitioner Ex. 9 p. 44 at B.1.1-B.2).

⁶ Since the 2000 Decision, Wolf Creek, with input from the Buyers, increased the amount of the value of the goods or services requiring a competitive bid from \$5,000 to \$50,000. (Tr. 437:11-438:15).

20. The Buyer performs a commercial evaluation to determine the most beneficial bid based on price, delivery, performance schedule, payment terms, warranties, exceptions, etc. (Tr. 2016 175:15-20; 183:15-184:3; Tr. 2017 400:16-20).
21. Cost is the most important factor in determining which vendor is awarded the bid, but cost alone is not determinative. Factors such as scheduling or the cost of freight may result in the bid being awarded to a supplier other than the lowest cost bidder. (Tr. 2016 118:18-14; 152:22; 153:4-154:12; 184:4-11; Tr. 2017 327:23-25; 400:12-14).
22. Buyers use a bid evaluation template. (Tr. 2016 184:12-185:11; Petitioner Ex. 8 p. 17 at 4.2-4.3).
23. When the bid is not awarded to the lowest bidder, or the sole source supplier, the Buyer must document the reason for selecting that vendor. (Tr. 2016 118:25-119:5; 185:12-186:5; Tr. 2017 328:1-9).
24. Without seeking prior approval the Buyer determines to whom the bid is awarded. (Tr. 2016 186:25-187:3; Tr. 2017 328:10-15; 367:10-24).
25. Buyers issue purchase orders. (Tr. 2016 102:1-6; 118:15; 158:10-17; 175:15-20; 186:25-187:3; 190:21-25; Tr. 2017 331:2-5; 336:1-3; Petitioner Ex. 8 p. 19 at 6.0).
26. Purchase Orders are not reviewed by the Purchasing and Contracts Supervisor prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2).
27. If the Purchasing and Contracts Supervisor reviews the purchase order and disagrees with it, he can cancel the order without the suppliers' agreement. (Tr. 2016 187:8-13).
28. With the aid of a software program, Buyers determine which carrier will be used for delivery of products. (Tr. 2016 119:6-122:8; Tr. 2017 330:12-16).
29. Buyers input relevant information (e.g., zip code of origin, weight, number of packages, etc.) into the software program, and the program outputs all of the carriers that are able to handle the run, the contract price cost for delivery, and the number of days for transit. (Tr. 2016 187:19-188:5).
30. Buyers select the carrier from the output list. (Tr. 2016 119:24).
31. Buyers may seek competitive bids when expedited delivery service is needed. (Tr. 2016 188:6-24).
32. Buyers track the purchase and ensure delivery according to the purchase order. (Tr. 2016 189:16-190:3; Tr. 2017 336:4-14).

33. Buyers negotiate the purchase price for goods and services. (Tr. 2016 161:13-18; Tr. 2017 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2).
34. Without prior approval or necessarily subsequent review, the Buyers initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2).
35. Although the Buyer cannot expend more on any particular requisition than the spending authority of the signatory requisition manager, the Buyer has discretion to spend any amount within that authority. (Tr. 2016 67:7; 179:9-15; Tr. 2017 331:15-333:18; 382:15-20; 401:6-12).

As evidenced by this list, the Buyers are performing the *same* job duties and responsibilities today, as they did in 2000. (02/16/16 Decision at 3-7). The *only* change in the Buyers' job duties is the alleged rise in efficiency in how these *same* tasks were performed, as a result of EMPAC.

The Board repeatedly has found that an increase in efficiency is wholly insufficient as a matter of law to significantly alter the fundamental characteristics of an employee's job duties. *See e.g., Constellation Power Source Generation, Inc.*, 2000 NLRB LEXIS 942, *104-05 (2000) (ALJ Shuster) (concluding that although the job has become more computerized since 1996, it has otherwise not changed); *United Tech. Corp.*, 287 N.L.R.B. 198, 204 (1987) (finding technological advancements did not significantly alter job duties); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, 861 (1999) (finding "differences in the methodology or the manner in which they perform their job, including use of technology . . . [] however, do not change the fundamental character of their job duties or their primary function of making advertisements ready for insertion into the newspaper.").

Betty Saylor ("Saylor"), retired Lead Buyer, was a Buyer when the 2000 Decision issued and testified that "[t]he process of being a buyer is the same no matter what system you're in" and that although EMPAC "gave us automation . . . what we did to do our job didn't change."

(Tr. 2016 175:12-20; 186:6-12). In sum, Sayler provided un rebutted testimony that over the past 28 years, the fundamental character of the Buyers' job duties did not change in any material respect. Neither did EMPAC have any impact whatsoever on the Buyers' discretion or level of authority. (Tr. 2016 186:13-24).

Accordingly, the fundamental character of the Buyers' job duties, level of independence, and discretion remains unchanged and mandates review.

B. The Regional Director Erred In Concluding That The Buyers Are Not Managerial Employees.

It is well-settled that managerial employees are not covered by the Act. Indeed, over 40 years ago, the U.S. Supreme Court held:

In sum, the Board's early decisions, the purposes and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point *unmistakably to the conclusion that "managerial employees" are not covered by the Act.*

NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 289 (1974) (emphasis added).

In *NLRB v. Yeshiva, Univ.*, 444 U.S. 672, 682-83 (1980), the U.S. Supreme Court defined managerial employees and set forth the following test:

Managerial employees are defined as those who "*formulate and effectuate management policies by expressing and making operative the decisions of their employer.*" *Bell Aerospace Co.*, 416 U. S. at 289 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, n.4 (1947)). . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management... Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he *represents management interest by taking or recommending discretionary actions that effectively control or implement employer policy.*

Id. (emphasis added).

In *Yeshiva*, the Court explained that managerial employees, like supervisors, “are excluded from the categories of employees entitled to the benefits of collective bargaining” under the Act, because “both exemptions grow out of the same concern: that an employer is entitled to undivided loyalty of its representatives.” (*Id.* at 682).

For the reasons that follow, the Buyers are “managerial employees” and, therefore, the Regional Director erred in concluding to the contrary and this error prejudiced the Employer.

1. The Regional Director’s 2016 Decision And Order Fails To Correctly Apply *Concepts & Designs, Inc.* In Finding That The Buyers Do Not Exercise The Necessary Discretion And Authority Of Managerial Employees.⁷

In his 2016 Decision and Order, the Regional Director cited *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) but failed to correctly apply it to the facts in this matter. (2/16/16 Decision at 12). In *Concepts & Designs*, a purchasing employee was responsible for ordering manufacturing parts based upon bills of materials for such projects. (*Id.* at 956). The Board concluded that the employee’s “discretion and the magnitude of its impact on Respondent’s overall business” demonstrated “managerial status.” (*Id.* at 957).⁸

Importantly, the Board noted that although the employee typically ordered parts from the vendors listed on the employer’s inventory cards, she maintained the discretion to change vendors based upon the price and time of delivery. (*Id.*). This included identifying additional vendors outside the employer’s inventory cards. (*Id.*). Importantly, the inventory cards, similar to EMPAC, “identified the part, the minimum number needed in inventory, the vendor from whom it is usually ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally the names of other vendors who can supply that same part.” (*Id.* at 956).

⁷ In its April 7, 2017, Decision on Review and Order Remanding, the Board declined to grant review on the Regional Director’s finding that the Buyers were not managerial employees.

⁸ In a stroke of supreme irony, the Acting Regional Director who authored the 2000 Decision also relied heavily on *Concepts and Designs*, but to reach the opposite conclusion regarding the Buyers’ managerial status.

As part of this process, the employee consulted with the employer's "technically knowledgeable personnel" as well as with her supervisor if she was unable to locate a supplier. (*Id.* at 957). However, the Board noted that "even statutory Supervisors will confer with their superiors whenever unusual situations arise; that does not strip them of their supervisory status based upon powers which they ordinarily exercise." (*Id.*). The employee was further authorized to confer with vendors regarding any potential purchases. (*Id.*).

In his 2016 Decision, the Regional Director concluded that the Buyers' exercise of discretion in identifying suppliers to participate in the competitive bidding process, as well as the Buyers' ultimate selection of vendor was not determinative of their managerial status. (2/16/16 Decision at 9). The Regional Director reasoned that "although Buyers do exercise discretion with regard to who they offer RFQ's, the discretion takes place within the confines of Employer policy." (*Id.* at 10).

The Regional Director's findings are wholly inconsistent with the Board's decision in *Concepts & Designs, Inc.* For example, the buyer in *Concepts & Designs*, like the Buyers in this matter, purchased items following receipt of a requisition or "based upon bills of materials for such projects." (*Id.* at 956; Tr. at 42:23-43:19; 97:12-18). To assist in these purchases, the buyer in *Concepts & Designs* utilized the Employer's inventory cards, which "identified the part, the minimum number needed in inventory, the vendor from whom it is usually ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally, the names of other vendors who can supply that same part." (*Id.*).

Here, the Employer's EMPAC database provides the same information as the inventory cards in *Concepts & Designs, Inc.* (Tr. at 55:6-22; 108:9-24; 181:7-16; 182:6-15). Similar to the Buyers in this matter, who consult with project engineers on safety and engineered items, the

buyer in *Concepts & Design* regularly consulted with “technically knowledgeable personnel” as well as her supervisor. (*Id.* at 957; Tr. at 182:24-183:14). However, the Board expressly held that “that does not strip them of their supervisory status based upon powers which they ordinarily exercise.” The buyer also conferred with, negotiated and resolved disputes with vendors without management assistance—conduct engaged in by the Wolf Creek Buyers—and conduct found by the Board as indicative of the managerial status of the employee in *Concepts & Designs*. (Tr. at 113:10-114:3; 161:13-18).

The Buyers in this matter engage in additional tasks that exceed the level of discretion and authority exhibited by the buyer in *Concepts & Designs*. Not only have they continued to engage in 35 enumerated duties for the past 18 years, *see Supra* Part IV.A.iv., they do so acting as representatives of the Employer. (Tr. 2017 401:8).

Indeed, the Board consistently has found employees who exercise this level of discretion and authority to be managerial employees. *See e.g., Mack Trucks, Inc.*, 116 NLRB 1576, 1578 (1956) (excluding buyers as managerial employees because they had authority to negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items); *Kearney & Trecker Corp.*, 121 NLRB 817, 822 (1958) (finding buyers’ authority to place orders with alternative suppliers if deliveries were not made on time indicative of a managerial employee). For example, in *Titeflex, Inc.*, 103 NLRB 223 (1953), the Board found a buyer to be a managerial employee based on similar job duties:

He receives requisitions that have been prepared by the planning department, countersigned by the person in charge of the department, and he places them with an approved list of vendors. Although he cannot go outside that list of vendors he may use his discretion as to which of those vendors will receive the order. He has final authority over such deals and is able to ***responsibly commit*** the credit of the Employer. We find that he is a managerial employee and we shall exclude him from the unit.

(*Id.* at 225) (emphasis added).

The Board's decision in *Concepts & Designs* is controlling and the Regional Director's failure to correctly apply it to the facts in this matter raises substantial questions of law and policy. Accordingly, the Regional Director's departure from well-settled Board precedent raises a substantial question of law and policy for review.

2. **The Regional Director's 2017 Supplemental Decision Fails To Correctly Apply *Lockheed-California Company, Et Al.* In Finding That The Buyers Do Not Exercise The Necessary Discretion And Authority Of Managerial Employees.**

a. The Regional Director Misapplied *Lockheed-California Company*

In his 2017 Supplemental Decision, the Regional Director again misapplied numerous cases to the facts and failed to give any credence to witness testimony in support of finding the Buyers to have managerial status. (5/9/17 Decision at 10).

First, in *Lockheed-California Co.*, 217 NLRB 573 (1975) the sole issue decided by the Board was whether the buyers were in fact managerial employees. (*Id.* at 574). Importantly, in finding the buyers did not have managerial status, the Board relied on a number of factors which the Regional Director failed to consider in the instant matter. First, the *Lockheed* buyers had no formal educational requirements. Interestingly, some of the *Lockheed* buyers "do not actually engage in procuring of material." (*Id.* at n.8). All of the Buyers in the instant case engage in procuring material and are required to have both formal and informal educational requirements, certifications, and continuous training. (Tr. 2016 26:19-30:1; 31:5-22; Petitioner's Ex. 1).

Upon receipt of the purchasing assignment, the *Lockheed* buyers were responsible for initiating the necessary steps of the procurement process, but they, unlike the Wolf Creek Buyers, had little to no discretion in formulating the bid list. (*Id.*). Unlike the Buyers in the instant matter, the *Lockheed* bid list required "approv[er] before the Buyer [] [could] send out

invitations to bid.” (*Id.*). Here, the Buyers create the bid and provide the bid to vendors of the Buyers’ choosing—with the exception of safety and engineered parts. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 150:9-152:6; 166:4-23; 175:15-20; 180:5-8; 180:24-181:3-182:12; 181:18; Tr. 2017 325:11-326:4; 399:21-25; 375:18-25; 400:5-11; 413:18-414:13; 437:11-438:15; Petitioner Ex. 8 p. 17 at 4.0; p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4).

The *Lockheed* buyers “level of authorization depends on the estimated cost of the procurement.” (*Id.*). Wolf Creek Buyers have no such requirements. Instead the level of authorization depends on the authorizer’s purchasing power, up to and including items costing \$250,000. (Tr. 2016 98:19-100-11; 146:10-147:4; 158:4-9; 179:9-15; Tr. 2017 270:16-24; 356:17-25; 364:9-15; 416:16-20; 356:17-25; 364:9-15; 270:16-24; Petitioner Ex. 9 at 42).

Importantly, as part of the *Lockheed* purchasing process, “numerous organizations [within Lockheed] evaluate different sections of *each* bid. . . . on the basis of this data, the buyer selects the supplier to be used.” (*Id.*) (emphasis added). In other words, the *Lockheed* buyers’ “selection is subject to review” of multiple layers of corporate scrutiny. (*Id.*). The *Lockheed* bid process is in complete contravention to Wolf Creek’s, where the Buyer has the authority, absent input, to determine which vendor to award the bid. (Tr. 2016 186:25-187:3; Tr. 2017 328:10-15; 367:10-24). For example, upon receiving the purchase order, the Wolf Creek Buyers move through the requisition process absent organizational input and scrutiny as to whom should receive the bid. (*Id.*). The Buyers in the instant matter use their experience and independent judgment to determine to whom the bid is awarded. (*Id.*; Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2).

Indeed, the Board emphasized that the “Buyer’s selection of a source is subject to review and disputes along the way are all ultimately ruled on by [an] authority higher than the Buyers.”

Lockheed at 575. Importantly, *Lockheed* placed additional limitations on its buyers by requiring authorization of each request to purchase, which is issued after vendor selection. (*Id.*). These facts could not be further from those in the instant case where the Buyers alone are responsible for resolving issues, including negotiating price and delivery disputes. (Tr. 2016 161:13-18; Tr. 2017 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2). Buyers in the instant case have no such requirements. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2). *See Solartec, Inc.*, 352 NLRB 331 (2008), *enf'd* at *NLRB v Solartec, Inc.*, 310 F. App'x. 829, (6th Cir. 2009) (machine Superintendent's "right hand man" found not to be managerial where duties included making routine tool purchases, non-routine purchases of testing tools and conveying price quotes to management when tool salesmen visited the shop, but had no involvement in the selection of vendors, or adjusting disputes with vendors and was required to seek approval for finalizing purchase orders); *Mack Trucks, Inc.*, 116 NLRB 1576 (1956) (finding buyers and assistant buyers managerial because they received requisitions which they filed by placing purchase orders, pledged the Employer's credit in amounts ranging from \$800,000 to \$6,000,000, negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items).

In his supplemental Decision, the Regional Director erred in concluding that the Wolf Creek Buyers were like the buyers in *Lockheed* in that the Wolf Creek "Buyers have little if any independent purchasing authority and they often rely on others within the Employer's organization to determine which supplier to use. (5/9/17 Decision at 10). Indeed, the Buyers in the instant matter issue purchase orders; independently issue a competitive bid if needed; absent approval, select the vendor; and complete the purchase. (*Id.*; Tr. 2016 102:7-17; 124:22-125:2; 151:20-152:6; 166:4-18; 169:6-17; 175:15-20; 180:24-181:3; 183:15-184:3; Tr. 2017 337:1-5;

399:21-25; 375:18-25; 400:16-20 Petitioner Ex. 8 p. 17 at 4.0; p. 19 at 6.2). The Wolf Creek Buyers are not laden with the limitations and oversight placed upon the *Lockheed* buyers. The Regional Director's inability to see such discrepancy is prejudicial to the Employer.

b. The Regional Director's 5/9/17 Supplemental Decision Misapplies A Number Of Additional Cases.

The Regional Director erred in comparing the Wolf Creek Buyers to non-managerial employees whose duties and authority are not parallel. First, the Regional Director compared the Buyers in the instant matter to a "Supervisor of Transportation and Work Equipment" who, having no "discretion or authority to make the ultimate determination, independent of Company consideration and approval, was found to not have managerial authority." *Iowa Southern Utilities Co.*, 207 NLRB 341, 345 (1973). *Contra EDP Med. Computer Sys.*, 284 NLRB 1232 (1987) (employee who held himself out to the public as a representative of management, found to be a managerial employee as it was clear the Employer placed him in a position where employees could reasonably believe that he spoke on its behalf). Further controlling the Board's decision is that the supervisor "did not 'formulate, determine, and effectuate Respondent's policies.'" *Iowa Southern Utilities Co* at 345.

The Regional Director, ignoring on the record testimony, found that "they (the Buyers) neither make the ultimate decision to acquire materials or approve the acquisition of materials." (5/9/2017 Decision at 10). It is uncontested that the Buyers in the instant matter, have, for at least the last 18 years, made the ultimate decision concerning the acquisition of materials. (Tr. 2016 102:7-17; 119:24; 124:22-125:2; 169:6-17; 186:25-187:7; Tr. 2017 328:10-15; 337:1-5; 367:10-24; Petitioner Ex. 8 p. 19 at 6.2). In fact, Wolf Creek recently relied on the Buyers' input and opinion when formulating, determining, and increasing the monetary limitations of items to be competitively bid from \$5,000 to \$50,000. (Tr. 2017 437:15-438:5).

Lastly, in determining that the Buyers are not managerial employees, the Regional Director erred in his reliance on *The Washington Post Co.* 254 NLRB 168 (1981). In *The Washington Post* the assistant purchasing manager was responsible for the “acquisition of stock items.” (*Id.* at 189). Such items included scotch tape, paper, and preprinted forms for date processing. (*Id.*). The assistant purchasing manager spent approximately “half of his time in the stock area determining the need for items and reordering them.” (*Id.*). Using only “price and quality as guidelines, [the assistant manager] selects the most appropriate vendor for the Employer.” (*Id.*).

The Regional Director reasoned that the Buyers in the instant matter are like the assistant purchasing manager in *The Washington Post* in that “they have little if any independent purchasing authority, and they often rely on others within the Employer’s organization to determine which supplier to use.” (5/9/16 Decision). Indeed, the Buyers in the instant matter purchase items beyond tape and paper, they purchase items for a nuclear power facility, including single valves costing \$83,000 a piece. (Tr. 2016 63:6). They do so with the authority to purchase items up to \$250,000 absent any additional approval. (Tr. 2016 67:7; 102:7-17; 124:22-125:2; 158:4-9; 169:6-17; 179:9-15; Tr. 2017 270:16-24; 331:15-333:18; 337:1-5; 356:17-25; 364:9-15; 382:15-20; 401:6-12; 416:16-20; Petitioner Ex. 8 p. 19 at 6.2; Petitioner Ex. 9 at 42).

While price is an important factor, it is by far not the only factor relied on by the Buyers in determining to whom the bid will be awarded. Factors such as scheduling or the cost of freight may result in the bid being awarded to a supplier other than the lowest cost bidder. (Tr. 2016 118:18-14; 152:22; 153:4-154:12; 184:4-11; Tr. 2017 327:23-25; 400:12-14). Again, the Buyers use their independent judgment in making those determinations. (*Id.*).

The facts in *Lockheed* and similar cases cited by the Regional Director do not align with the facts in the instant case. Such cases are not controlling and the Regional Director prejudiced Wolf Creek by incorrectly applying the facts in these cases to the facts in this matter, raising substantial questions of law and policy.

3. The Regional Director Erred In Failing To Give Appropriate Weight To The Substantial Amount Of Funds The Buyers Commit On Behalf Of The Employer.

Both the 2016 and 2017 Decision discount the Buyers' ability to commit significant amounts of the Employer's funds and failed to give credence to well established law highlighting the same.

In *Concepts and Designs*, the Board emphasized an employee's ability to commit substantial sums of money on behalf of the employer as indicative of managerial status. *Concepts and Designs*, at 957. ("Ability to commit an employer's credit in amounts which are substantial, especially where done through exercise of discretion which is not ordinarily reviewed, is *strong evidence of managerial status*.") (citing *Swift & Co.*, 115 NLRB 752, 753 (1956); *American Locomotive Co.*, 92 NLRB 115, 116-17 (1950)) (emphasis added) (concluding that "in carrying out these duties she 'represents management interests by taking . . . discretionary actions that effectively . . . implement employer policy.'"); *Girdler Company*, 115 NLRB 726 (1956) (buyers found to be managerial because they had the final authority to commit the employer's credit up to \$2,000).

In *Federal Tel. & Tel. Co.*, 120 NLRB 1652 (1958), the Board excluded buyers as managerial where, without approval, they were authorized to order merchandise in the amount of \$2,500 or less, and purchase large quantities of merchandise. The Board found this authority demonstrated a prerogative of management and interests aligned with management; *See also Western Gear Corporation*, 160 NLRB 272 (1966) (buyers excluded as managerial where they

had discretion to pledge employer's credit up to \$5,000); *The Grocers Supply Co. Inc.*, 160 NLRB 485 (1966) (buyers excluded as managerial where they exercised judgment in purchasing decisions and pledged Employer's credit, purchased products supplied to employer's customers, handled ordering, checking, filing, and other functions incident to buying, including negotiations with suppliers); *Salinas Newspapers, Inc.*, 279 NLRB 1007 (May 19, 1986) (credit managers excluded as managerial where they extended and denied credit of the employer, and where they exercised discretion independence in making these decisions, subject to limited oversight).

In an attempt to distinguish the Board's decision in *Concepts & Designs*, the Regional Director, in his 2/16/16 Decision, emphasized but failed to rely on evidence that the employee in *Concepts & Designs*, attended management meetings, "meetings with vendors" and "committed the employer's credit, regardless of amount, without being reviewed by other officials of the employer." (02/16/16 Decision at 12).

Contrary to the Regional Director's analysis, the Board in *Concepts & Designs*, did not find the employee's ability to commit employer funds to be limitless. (*Id.*). Nor did the Board find the buyer's purchases to be immune from management review. (*Id.*). Rather, the Board in *Concepts & Designs*, expressly noted that "those purchasing duties [are] not **ordinarily reviewed** by any other official of Respondent." (*Id.* at 957) (emphasis added). Likewise, in this matter, Buyers testified that although management possessed the ability, it did not regularly review purchase orders. (Tr. 2016 86:2-14; 102:7-17; 124:22-125:2; 169:6-17; 187:4-7).

In his 5/9/17 Supplemental Decision, the Regional Director stated that "[a]lthough the [B]uyers still act as the Employer's agent to commit the Employer's funds by issuing purchase orders, they neither make the ultimate decision to acquire materials or approve the acquisition of materials." (5/9/17 Decision at 10). In fact, undisputed testimony supports the exact opposite

claim. Buyers are still responsible for committing funds in the company's best interest and such actions demonstrate that the Buyers are still managerial employees. (Tr. 366:4-18). Indeed, the Buyers financially commit the Employer's funds in substantial amounts. It is uncontested those amounts totaled **\$21 million** in 2015. (Tr. at 124:22-125:2; 169:6-24; 204:22-205:1). Further, the Regional Director ignored the over \$300,000 annual savings the Employer enjoyed due to the Buyers' cost savings measures, as indicative of a managerial employee. (2/16/16 Decision at 11).

The Buyers themselves even testified that without prior approval or necessarily subsequent review, they independently initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2). Additionally, the Buyers negotiate the final purchase price for goods and services. (Tr. 2016 161:13-18; Tr. 2017 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2). These purchase orders are not reviewed prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2). *See Simplex Industries, Inc.*, 243 NLRB 111 (1979) (buyer committed approximately \$5.75 million, found to be managerial based purchasing decisions predicated on "price, delivery, [and] quality," with limitations on quality by the standards established by the quality control department; authority to contract with new vendors and change vendors, provided quality control standards are met); *American Locomotive Co.*, 92 NLRB 115 (1950) (buyers who purchased \$6 million of material each year, found to be managerial in that they negotiated credit and replacements when defective material delivered and tried to direct profitable business to suppliers who give special consideration on orders of critical material). *See Hunt & Mottett Co.*, 206 NLRB 285 (1973) (buyers managerial and therefore excluded from the Act where employer argued that Buyers were vested with a substantial degree of discretion in decision and able to pledge large amounts of employer's credit).

The Regional Director further ignored the overwhelming evidence in the record that the Buyers' interests are sufficiently aligned with management. As in *Concepts & Designs, Inc.*, the Buyers regularly confer with potential suppliers, discuss, and evaluate exceptions to RFQs, and negotiate prices and transportation costs without management intervention. (Tr. at 161:13-18; 170:4-171:10). Despite this compelling evidence and the Petitioner's failure to even come close to satisfying its burden of proof, the Regional Director found that the Buyers are more closely aligned with employees than management, and therefore, entitled to the protection of the Act. (02/16/16 D&O, p. 12-13). This error should be reviewed and reversed.

V. CONCLUSION

As demonstrated in the record, including the transcripts, exhibits, 2016 Decision and Order and 2017 Supplemental Decision, there is ample evidence that Petitioner has failed to meet its burden of material change and that the Buyers are managerial employees, not covered by the Act. Accordingly, the Regional Director's Decision and Order, as it relates to the managerial status of the Buyers, and Supplemental Decision and, warrant review.

Respectfully submitted,

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